

CASE NO. 552/90
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

VICTOR GEORGE

APPELLANT

and

THE STATE

RESPONDENT

CORAM: NESTADT, NIENABER JJA et HARMS AJA

DATE HEARD: 25 NOVEMBER 1991

DATE DELIVERED: 27 FEBRUARY 1992

J U D G M E N T

NESTADT, JA:

Appellant was convicted of murder by VERMOOTEN
AJ sitting with assessors in the Witwatersrand Local
Division. Extenuating circumstances having been found,
he was sentenced to seven years imprisonment. With the

leave of this Court, he appeals against his conviction.

It was not in dispute that appellant killed deceased by shooting him once with a 7,65 mm semi-automatic pistol in the head. The incident took place on the afternoon of Friday 23 December 1989 at a place called Devland in the district of Johannesburg. Appellant and deceased were co-employees of a security company which had its administrative offices in the area. Having finished work for the day, they were relaxing at a spot in the veld some 300 metres from the company's premises. Also present were a number of their colleagues, including Rodney Johnston, Charles Sombur and Terence Fredericks. There were between eight and ten of them. Liquor was being consumed. An argument developed between Sombur and deceased on the one hand and Fredericks on the other. It led to Sombur hitting Fredericks. Fredericks moved towards where

appellant was. They were friends. They left the scene. At some stage thereafter they met Denzil Buitendacht. Buitendacht also worked for the company. His position was that of site officer. As such he was a person in authority. Appellant told Buitendacht of the attack on Fredericks. Buitendacht and appellant returned to where the group was. Appellant now had the firearm referred to in his possession. At the scene Buidendacht remonstrated with Sombur. He struck Sombur in the face. Deceased and appellant were standing in the vicinity. Deceased was unarmed. Appellant pointed the firearm at deceased. A shot was fired. These, in brief, were the circumstances in which deceased was killed.

The State case was that the shooting was a deliberate one. It rested primarily on the evidence of Johnston. His description of what happened was the

following:

"Dit is reg, toe het Denzil en Sombur nou 'n squealery, toe baklei hulle nou daar. En toe almal se aandag daar is, toe ek weer omdraai om te kyk, toe sien ek net die beskuldigde lig die vuurwapen op en hy wys dit na die oorledene en toe sê die oorlede net vir hom 'as jy my wil skiet dan moet jy my skiet' en toe gaan die skoot af...

Op die stadium wat die skoot afgegaan het wat was die oorlede besig om te doen? --- Die oorlede het net stilgestaan en vir hom gekyk.

HOF: Het hy nie gestap na die beskuldigde toe nie? --- Nee, hy het net stilgestaan."

They were about three to four metres away from each other. There was no argument between them. But just before the shooting appellant had said that "Denzil Buitendacht and Sombur were his friends, now what was he supposed to do now".

Appellant's version was different. He explained that after he met Buitendacht and reported to him that Fredericks had been assaulted and as he and Buitendacht returned to the scene, Buitendacht took out

a firearm and said to him "Hou hierso". Appellant took the firearm. It was in this way that he came into possession of it. Buitendacht proceeded to hit Sombur. Just after this, whilst Buitendacht was still involved in ascertaining why Fredericks had been assaulted, deceased advanced towards appellant. At this stage appellant had the firearm in his hand. What appellant says then happened is summarised by VERMOOTEN AJ as follows:

"Deceased...said 'gee my daardie fokken vuurwapen'. Accused back pedalled, deceased repeated what he had just said and at that stage, accused says, he was very afraid of the deceased whom he knew to be an aggressive person. The accused lifted the gun up and pointed it towards the deceased. The accused says he gripped the gun with finger on trigger. He did not know it was loaded. The shot went off..."

He never cocked the firearm. He had pointed it at deceased "to scare him away". He never aimed it. He had "no reason (and) no intention to kill (deceased) or

even to hurt him". He denied that deceased said what Johnston alleged, viz, "As jy my wil skiet, dan moet jy skiet".

Clearly the trial court was faced with a credibility issue. This it resolved in favour of the State. Johnston was regarded as honest and reliable. Appellant's evidence, on the other hand, caused difficulty. Based on what he said under cross-examination, it was regarded as amounting to an admission that, in circumstances in which he was not entitled to shoot, he pointed the gun at deceased and deliberately pulled the trigger; but, because he allegedly did not know the firearm was loaded, he assumed that firing the gun would have no effect. This defence was rejected. It was found that "at best for the accused" he "did foresee the possibility that the pistol might be loaded and that death could result if he fired and that he acted recklessly whether such

result ensued or not". Appellant's conviction of murder on the basis of dolus eventualis followed.

In my opinion the trial court's approach cannot be supported. The first problem is to ascertain exactly what appellant's version was. It is true that his evidence is confusing. At one stage he said:

"I could say because I didn't know that it was loaded and I could say my grip was tight and at that stage I was tensed up and that is why my grip was so tight on the gun and it went off. I do admit that I shot, I pulled the trigger, right, but then I didn't know that it was loaded because...

But you are telling the court that you thought at the time the firearm was not loaded? --- That is correct.

And that is why you didn't think pulling the trigger would have any effect? --- Any effect, that is correct...

COURT: Just a minute, Mr George, if you did not know that the gun was loaded why did you press the trigger? --- It was, it is just the way I gripped it.

No, no, you have told us in evidence in chief that you pressed the trigger, not anything else, you pressed it, not gripped it, you pressed it. Why did you press the trigger if you didn't think the gun was loaded? -- I

don't know how to explain it."

These are the passages relied on by the judge a quo for his conclusion that appellant, knowing that the firearm might be loaded, deliberately pulled the trigger. I do not think that anything flows from his statement that "I shot, I pulled the trigger". As a fact he did. Otherwise deceased would not have been killed. But non constat that he acted deliberately. The further passages do, however, give rise to difficulty. Here appellant does seem to concede a deliberate pulling of the trigger. One would have thought that if it was never his intention to fire, it would be irrelevant to him whether the firearm was loaded or not. Yet he seems to refer to this aspect as a justification for thinking that intentionally pulling the trigger would have no effect. Reading his evidence in context, however, I am not satisfied that this is truly so. There are two

aspects to appellants' evidence. The one is his state of mind concerning whether the firearm was loaded. Here his evidence is clear, viz, that he did not know this; indeed that he thought that the firearm was not loaded. The other is whether his firing of the pistol was deliberate. It seems to me that his evidence in this latter regard must be evaluated on the basis that his assertion that he took the firearm to be unloaded is true. Proceeding on this basis, I do not think that, properly interpreted, the passages quoted necessarily constitute an admission that he intended to shoot deceased. To have deliberately pulled the trigger thinking that the firearm was not loaded would have been a futile, senseless act on appellant's part. So appellant could not, when referring to "pulling the trigger" or "press the trigger" have intended to admit that these actions were performed deliberately, let

alone with knowledge that he was acting wrongfully. It seems to me that what he probably meant was that because he believed the firearm to be harmless (seeing it was not loaded), he thought nothing of gripping it (including the trigger) tightly. This is supported by what he said in evidence-in-chief.

Consider the following extracts:

"I didn't even know the thing was loaded, that is why I just lifted it up and pointed at him, like to scare him away...(H)e was advancing fast towards me and the gun was up and I don't know what was going through my mind exactly at that moment because I was just all tensed up and with that I gripped the gun very tight, that is with my finger on the trigger."

So appellant did not, as the learned trial judge evidently thought, admit to having (wilfully) pulled or pressed the trigger. His defence was, and I think remained, that the shooting was an involuntary, accidental one.

The next question is: Was this explanation

reasonably possibly true? Unfortunately the trial court, by reason of its incorrect assessment of what appellant was saying, did not properly consider this question. So we have to do the best we can on the record. I am by no means impressed by appellant's evidence. It may be said to be improbable that deceased would confront appellant by demanding that he hand over the firearm when appellant constituted an obvious danger to him. Obversely, if appellant really thought it was not loaded, why not comply with deceased's demand? There is the evidence of the ballistics expert who examined the firearm in question. Testifying on behalf of the State, he said that the trigger had a "effens swaarder snellerdruk" (of about 2,9 kilograms in the cocked position) than the normal firearm. This detracts from the firing being accidental. And appellant did not when shortly

afterwards he reported what had happened to his superior, a Mr Bartmann, allege that it was an accident. Appellant seems to exaggerate what liquor he had drank and its effect on him. There are other criticisms of appellant's evidence to which the trial court refers. The defence relied on is an inherently subjective one which must be approached with considerable circumspection if not scepticism.

On the other hand, there are considerations which, if they do not support appellant's version, make its rejection problematical. Evidence that it was appellant who fetched and loaded the firearm and then cocked it would have been strongly indicative of an intention to shoot. Indeed, this was the case that the State sought to present. But there was no evidence to gainsay appellant's denial that he acted in this way (or that he knew that the firearm was loaded). Moreover, why should appellant want to shoot deceased?

It is improbable that this was because at one stage that afternoon deceased also attacked Fredericks. The main culprit in this regard was Sombur. At the time of the shooting deceased was, on the State case, standing innocently by. Buitendacht was surely a vital witness. He would have been able to say whether he handed the firearm to appellant; whether it was he who loaded it and made it ready to fire; and where this took place. He might also have been able to relate what words passed between deceased and appellant just prior to the shooting. Buitendacht was, in other words, a key figure in the whole incident. With justification, the trial judge found that "(i)t is clear that he did take part to a great extent in the happenings of that fatal afternoon..." Yet, despite appearing on the State's list of witnesses and being available (he was at court), Buitendacht was not called by the State. The reason given by the prosecutor to the trial court was

that his evidence "did not support either of the parties". In my view, an inference adverse to the State should, in the circumstances, have been drawn. The matter goes further. I am inclined to agree with counsel for appellant that, not having been called by the State, the trial judge was, in terms of sec 186 of the Criminal Procedure Act, 51 of 1977, bound to have regarded Buitendacht as "essential to the just decision of the case" and himself to have called him. VERMOOTEN AJ considered whether he should do so. I am not impressed by his reasons for deciding not to. Be this as it may, the result was that the State case rested substantially on the evidence of Johnston and Sombur. But Sombur does not take the State case further. He neither heard nor saw anything of consequence. So one is, in substance, left with the evidence of Johnston. I do not propose to deal with

the detailed attack that was made on it by counsel for appellant. Suffice it to say that on a reading of Johnston's evidence, there are good reasons for suspecting his credibility. And, I should add, his description of the events is not irreconcilable with appellant's evidence that he was handed the firearm by Buitendacht in close proximity to where the shooting, shortly afterwards, took place. Finally, there is the evidence of Fredericks. He testified for appellant. I do not think that what he says is of much moment. But he does tend to refute the suggestion that it was appellant who went to fetch the firearm.

I do not say that appellant's evidence is to be believed. But in my opinion it cannot be concluded that it was proved to be false. This being so, his conviction of murder cannot stand; it is reasonably possible that the shooting was, as he alleged, an

accident. It does not, however, follow that he was entitled to be acquitted. In shooting deceased, he clearly acted negligently. He ought, particularly having regard to his experience with firearms, to have foreseen that the pistol might be loaded, that its safety catch possibly disengaged and the mechanism cocked; in other words that if the trigger was pulled, a bullet would be discharged. Appellant in his evidence admits as much. He concedes that bullets are sometimes left in the magazine of firearms handed in by employees (all of whom carry guns) of the company at its offices. Yet, having received the pistol from Buitendacht, he failed to check that it was safe. This was, he admitted, "a mistake that I made". Appellant was in control of the situation. He ought reasonably to have been more careful. Instead, without taking any precautions, he pointed the pistol at the head of

deceased who was but a few metres away. At the same time he, in a tense frame of mind, gripped the trigger which ex hypothesi did not require much pressure to activate it. These are actions for which he was responsible and which were the cause of deceased's death. As I have said, appellant conceded that he was not entitled to shoot. Appellant is guilty and must be convicted of culpable homicide.

It remains to decide on an appropriate sentence. Punishing an accused for having been negligent is often a difficult matter (compare the discussion of this matter in Hunt: South African Criminal Law and Procedure, vol II, 2nd ed, 423-425). There are cases, however, where bearing in mind the deterrent and retributive purposes of punishment, the sanctity of human life requires to be emphasised (R vs Barnardo 1960(3) SA 552(A) at 557 D). More especially

is this so where the killing is caused by what is referred to in R vs Karg 1961(1) SA 231(A) at 234 G as "the unfortunate tendency in our country to reach for firearms under the slightest provocation". The present matter falls broadly within this category of case. I have, accordingly, come to the conclusion that a moderate period of imprisonment, part of which should be suspended, must be imposed. Appellant (aged 24 at the time) has no previous convictions. But, unlike the accused in S vs Malik 1987((2) SA 813(A), I consider his degree of negligence to have been high. And the circumstances of the shooting in casu are very different from those in that case (in which a fine and suspended period of imprisonment were imposed).

The following order is made:

- (1) The appeal succeeds to this extent that the conviction and sentence for murder are set aside.

(2) There is substituted:

- (a) A conviction of culpable homicide, and,
- (b) A sentence of four years imprisonment,
 two of which are suspended for three
 years on condition that appellant is not
 convicted of an offence involving an
 assault on a person with a firearm which
 is committed during the period of
 suspension and in respect whereof an
 unsuspended sentence of imprisonment is
 imposed.

NESTADT, JA

NIENABER, JA CONCURS

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO:552/90

In the matter of:

VICTOR GEORGE

APPELLANT

and

THE STATE

RESPONDENT

Coram: NESTADT, NIENABER JJA et HARMS AJA

Date heard: 25 November 1991

Date delivered: 27 February 1992

J U D G M E N T

HARMS AJA:

I had the privilege of reading my Brother Nestadt JA's judgment but I am in respectful disagreement with the conclusion reached. The appeal should, in my view, be dismissed for the reasons that follow.

It can, for purposes of argument, be assumed that the court a quo had erred in accepting the evidence of the witness Johnston and in refusing to call the witness Buitendacht. The matter must therefore be approached on the basis that the issue is whether the State had, in the light of the defence's evidence, discharged its onus.

The objective facts are that the appellant did aim the weapon at the deceased's head, that he did pull the trigger, that to do so required a fair degree of force and that the shot killed the deceased. It is a reasonable assumption that a person intends the natural consequences of his acts and the facts stated lead to the prima facie conclusion that the appellant intentionally killed the deceased. The question is then whether there is an explanation which can be reasonably possibly be true without being speculative.

In his plea explanation in terms of s119 as well as s115 of the Criminal Procedure Act, 1977, the appellant alleged that he had no intention to kill the deceased, and that "die vuurwapen onverwags afgegaan het sonder dat ek die sneller getrek het [en] die sneller was baie fyn en ek vermoed dat my greep op die pistool onbewustelik verstewig het." The reason why he had pointed the firearm at the deceased was that the deceased was approaching and threatening him and wished to disarm him. He feared that the deceased would,

after having taken the weapon, shoot him and Buitendacht.

(That statement, by the way, makes nonsense of his later evidence that he believed that the gun was unloaded.)

Although there is some suggestion of self-defence in the explanation, no reliance was placed on self-defence by his counsel in either the court a quo or this Court. The defence put up was one of an involuntary pulling of the trigger. The court a quo rejected that defence, not, as was submitted, because it failed to consider the defence, but because it came to the conclusion that, having regard to the appellant's replies during cross-examination, the defence was not borne out by his own evidence. The factual basis of the defence viz that "die sneller was baie fyn" was shown by expert evidence to be false. To determine whether the court a quo was correct, I wish to quote extensively from the appellant's evidence:

"It is the time when me and Denzil approached

the scene he took out the gun from the back and he said "hou hierso".

A few questions later:

"Yes? --- Now we are going back to the part where he already hit Sombur and was moving to Mahapi and at that stage the deceased approached me because I was holding the gun in my hand and I was holding it in an awkward way.

Wait a bit, what, holding it in an awkward way? --- Yes, in an awkward way, I mean I was not holding it as you usually hold a gun, I was just, like he just gave me I took it and I was just holding it like this. If I could explain it?

Is that gun unloaded, Mr Orderly, make sure please. Now show us how you held the gun. The witness shows the four fingers are below the trigger guard and the thumb is above the barrel and that is the right hand. Yes? --- And it was lowered down my side at the time he gave me because I was just standing and seeing him approach and Denzil is busy with this other guy and because at that stage everybody was like it is drunk and swearing and squealing and things like that going on and he approached me.

Who? --- The deceased.

Why? --- Because, I don't know because I found out split seconds afterwards when he said "gee daardie donnerse fokken vuurwapen hier", so he wants to come and take the gun from me because he saw Denzil give me the gun."

.....

"Yes, I back pedalled and at that time, I don't

know how it was that Denzil came to my right side because then he said "gee daardie fokken gun" vir die tweede keer, for the second time he said it again and he, at that stage I was very afraid of him. Actually I was frightened because he is built big ...

You say at that stage you were very afraid of him? --- That is correct.

Why at that stage? --- Because he wants to take the gun and I thought to myself here is the fighting going on and he is going to grab this gun from me which my site officer gave me. I can't just give him the gun and he was angry and he was, well they had more to drink than I can remember. And I know him actually as a very aggressive person, as a friend and as an aggressive person and he was coming in a very aggressive manner towards me and he wanted to take this gun. That is the way he approached with that aggressive manner of his. And he is drunk also and I don't trust him when he had too many shots in. And at that stage I did something that I still might regret, I lifted the firearm up, I lifted it up and I pointed it towards him. What I was thinking at that stage ...

Wait a bit, what about the safety catch? --- Nothing.

Pardon? --- It was just in my hand and I put it in my grip. I didn't take this, I didn't cock it, I didn't pull it over or put the safety catch off, nothing, because Denzil gave me the gun this way and I was just keeping it that way. I didn't even know the thing was loaded, that is why I just lifted it up and pointed it at him, like to scare him away.

Yes? --- And he didn't scare away, that is the stage when he was advancing fast now, he was advancing fast towards me and the gun was up and I don't know what was going through my mind exactly at that moment because I was just all tensed up and with that I gripped the gun very tight, that is with my finger on

the trigger.

What about your finger? --- My finger was inside the trigger.

On the trigger? --- That is correct because I didn't know the gun was loaded, that is one thing I never knew, and well at that stage the shot went off."

That was his evidence in chief. Once again, there is a suggestion of self-defence but what he really was saying was that he had his finger on the trigger because he did not know the gun was loaded; he implied that he had pulled the trigger by "tensing up". That does not mean that he had acted involuntarily. It means that he had acted because of tension caused by fear. His evidence during cross-examination confirms this interpretation:

"MR VAN DER MERWE: Well, did you think at the time that you were entitled to shoot the deceased? --- No.

So when the deceased approached you you at no stage thought that he was such a threat to you that you had to shoot him? --- Just repeat that question?

When the deceased approached you you at no stage thought that he was such a threat to you that you had to shoot him? --- The way I was thinking at that

stage, I mean like I said just now when he is drunk he is aggressive and which you have just showed me that he is about my same weight and so on, so I wouldn't say that but I know he was very aggressive and I was afraid of him.

But now I want you to answer my question. When the deceased approached you you were not that frightened of him that you thought I must shoot the man because he is threatening me. --- I did point the gun at him.

Yes, but I want to know did you think you must shoot him because he was threatening you? --- No, I didn't think so.

So the fact that he was approaching you, as far as you are concerned, is incidental or there is no relation to the fact that the shot went off, the two are not connected? --- I could say because I didn't know that it was loaded and I could say my grip was tight and at that stage I was tensed up and that is why my grip was so tight on the gun and it went off. I do admit that I shot, I pulled the trigger, right, but then I didn't know that it was loaded because ...

COURT: Just a moment, you admit that the gun was loaded? --- That is right.

MR VAN DER MERWE: But you are telling the court that you thought at the time that the firearm was not loaded? --- That is correct.

And that is why you didn't think pulling the trigger would have any effect? --- Any effect, that is correct.

Why was it necessary for you to aim the firearm at the deceased? You aimed the firearm, why? --- Usually if somebody does point a firearm at you, I mean it is obvious you would, it would scare you away, wouldn't it; so that is just what I thought at the time when I pointed him with the firearm."

.....

"COURT: Just a minute, Mr George, if you did not know that the gun was loaded why did you press the trigger? --- It was, it is just the way I gripped it.

No, no, you have told us in evidence in chief that you pressed the trigger, not anything else, you pressed it, not gripped it, you pressed it. Why did you press the trigger if you didn't think the gun was loaded? --- I don't know how to explain it."

The passages quoted were not taken in isolation. They represent the totality of the appellant's evidence on this issue. He did not rely on self-defence. I agree with the court a quo that what the appellant was saying was that he had pulled the trigger deliberately but under the belief that the weapon was not loaded. This evidence as to his belief was, in the light of his plea explanation and the last answer quoted, false. That leaves one with his evidence that, because he was tense, he pulled the trigger. But, what was the cause of his tension? It was the alleged threat by the deceased - a threat which, in his own eyes, did not lead to the shooting of the deceased. In short, the

appellant's explanation was false and was correctly rejected by the trial court. I would, therefore, dismiss the appeal.

A handwritten signature in dark ink, appearing to read 'Harms Aja', is written over a horizontal line.

HARMS AJA